Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 2, 1996

Mr. Yuri Calderon
Assistant School Attorney
Houston Independent School District
Hattie Mae White Administration Building
3830 Richmond Avenue
Houston, Texas 77027-5838

OR96-1813

Dear Mr. Calderon:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33830.

Houston Independent School District (the "district") received requests for a variety of records, including medical records, information about employment discrimination complaints for the 1994-95 school year, and copies of the Equal Employment Opportunity Commission ("EEOC") investigation reports for those complaints. You indicate that the district has released all of the records except for the medical records, discrimination complaint information, and investigation reports. You contend that these records may be withheld from disclosure pursuant to sections 552.101 and 552.103(a) of the Government Code.

You submitted the records at issue to this office. We agree that some of the documents are medical records, access to which is governed by provisions of the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of article 4495b provide:

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not

> disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the district obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, we conclude that access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). The district must comply with the provisions of the MPA.

Our review of the non-medical records at issue shows that the records related to pending EEOC complaints may be withheld from disclosure pursuant to section 552.103(a). To show the applicability of section 552.103(a) to records, a governmental entity must show that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. This office has stated that a pending EEOC. complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1. We note, however that section 552.103(a) is generally inapplicable to information if the opposing party to litigation has had access to the information at issue and also when the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 350 (1982), 349 (1982), 320 (1982). If information has already been disclosed to an opposing party or litigation has concluded, you must release the non-confidential information at issue.

As to the information that does not pertain to pending EEOC complaints, some of this information is protected from disclosure under sections 552.101 and 552.102 of the Government Code. The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in sections 552.101 or section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

In *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the

identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* at 525.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. *See* Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is generally narrow).

The representative sample of information submitted to this office contains a summary of an investigation of sexual harassment that does not appear to involve a pending EEOC complaint.[1] Pursuant to the court's decision in *Ellen*, you should de-identify the summary as to the alleged victim and witnesses prior to releasing the summary. You should also withhold the victim's statement.

Some of the other records at issue that are not otherwise protected from disclosure under section 552.103(a) are protected from disclosure as "education records" under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. "Education records" are records that

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). Thus, you must redact the identifying information about students prior to releasing any documents.[2]

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[1]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[2]We also note that this office has recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 33830

Enclosures: Submitted documents

cc: Ms. Mary L. Sinderson
Texas Commerce Bank Building
2900 Weslayan, Suite 400
Houston, Texas 77027-5117
(w/o enclosures)

Ms. Katherine L. Duff
Brim, Arnett & Judge, P.C.
2525 Wallingwood Drive
Building 14
Austin, Texas 78746
(w/o enclosures)

(Footnote continued)

required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.